Supreme Court, U.S.
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CASE NO. 94-1089

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1994

CITY OF HAMILTON, OHIO;
TRANSIT MANAGEMENT OF HAMILTON, INC.,
Petitioners,

v.

AMALGAMATED TRANSIT UNION LOCAL 738,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a State Supreme Court decision which interprets a State Statute, Ohio Revised Code Section 4117.01(c), and classifies employees as public employees under that statute, conflicts with federal labor law which has explicitly excluded public employees from its terms.

PARTIES TO THE PROCEEDING

Respondent Amalgamated Transit Union Local 738 agrees with the listing of parties contained in the petition for Certiorari. Amalgamated Transit Union Local 738 is a Union, affiliated with the International Union known as the Amalgamated Transit Union. Amalgamated Transit Union Local 738 is not a corporation.

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BRIEF IN OPPOSITION

Respondent Amalgamated Transit Union Local 738 respectfully requests that the Petitioners request for a writ of certiorari be denied.

OPINIONS BELOW

Amalgamated Transit Union Local 738 agrees with the listing of opinions below contained in the petition for certiorari.

BASIS FOR JURISDICTION

There is no basis for jurisdiction in the United States Supreme Court. This case involves solely matters of state law, and the interpretation of who is a "public employee" under Ohio state law. The Ohio State Employment Relations Board found, and the Ohio Supreme Court affirmed, that the Employees involved in this case were state employees, under the state law definition. Therefore, no federal question exists pursuant to 28 U.S.C. Section 1257.

STATUTES INVOLVED

This case solely involves the definition of "public employee" pursuant to Ohio Revised Code Section 4117.01(c).

STATEMENT OF THE CASE

This case involves the definition of "public employee" under Ohio Revised Code Section 4117.01(c).

Amalgamated Transit Union Local 738 [hereinafter referred to as "Local 738"], filed a Representation Petition before the State Employment Relations Board [hereinafter referred to as "SERB"] seeking to represent Bus Drivers and Mechanics providing bus service in the City of Hamilton [hereinafter referred to as "City"].

The issue before SERB was:

> Whether the City of Hamilton is the public employer of the bus drivers and mechanics employed in the public transit system, thus giving SERB jurisdiction to entertain the request for recognition.
>
> SERB opinion, p. 1

SERB answered this question affirmatively, and held that Transit

Management of Hamilton [hereinafter referred to as "A.T.E." or "T.M.H."] was merely an agent, and the City was the true employer.

SERB decided that T.M.H. was merely an agent of the City because:

> The facts in this case clearly indicate that **T.M.H. lacks both the independence and decision making authority** to carry out operation of the transit system on its own. **T.M.H. is a management business. It does not have its own resources** (money, equipment or manpower) to run the transit system. **Instead, for a fee, it performs essential managerial functions** that are necessary for daily operation of the system. The City has the authority and resources to operate the transit system and **T.M.H. is obliged under the management agreement to adhere to the City's rules and regulations** for doing so. The fact that the City, through an agreement, has delegated its management responsibilities to T.M.H. does not in this case establish the latter as an independent contractor.
>
> SERB opinion, p. 5 [Emphasis added].

SERB found that there was a management agreement between the City and T.M.H., but the City was the Employer of the Employees at issue.

The City and T.M.H. appealed SERB's decision to the Court of Common Pleas. The Court of Common Pleas reversed SERB.

Local 738 appealed to the Court of Appeals.

The Court of Appeals found that SERB did not have jurisdiction over the matter as a result of its interpretation of the statutory definition of "public employee."

Local 738 appealed from the Court of Appeals decision to the Supreme Court of Ohio.

The Supreme Court of Ohio reversed the Court of Appeals. The Supreme Court held that, as a matter of state statutory law, the employees involved were public employees.

The Ohio Supreme Court recognized:

> The determinative inquiry in this appeal is whether the transit workers at issue are "public employees" of the city of Hamilton pursuant to R.C. 4117.01(C). For the reasons that follow, **we hold that the transit workers are public employees. . .**
>
> Ohio Supreme Court decision, *Hamilton v. State Emp. Relations* (1994), 70 Ohio St.3d 210, 212.
>
> Emphasis added.

Based on the facts of the case, the Supreme Court concluded that

> it readily appears that the city owns, controls and sets policy for the transit system, and that the contract between ATE and the city specifically categorizes operating expenses as an obligation of the city. The city provides all of the funding for the transit system, owns all the buses, designates the bus routes, and sets the amounts of fares charged for the bus rides. In addition, according to SERB, the general manager of TMH was selected with the approval of the city.

Ohio Supreme Court decision, *Hamilton v. State Emp. Relations* (1994), 70 Ohio St.3d 210, 214.

In its opinion that the City was the true employer, SERB found the following facts:

1. T.M.H.'s "general manager serves only with the City's approval." [SERB op., p. 3]

2. The general manager "serves primarily as an agent of the City, administering public funds and personnel for a public transit system." [SERB op., p. 3]

3. The general manager "carries out the policies of the transit system for and on behalf of the City." [SERB op., p. 3]

4. The general manager was not "exercising the independent judgment required of an independent contractor." [SERB op., p. 3]

5. "While the City may play a less visible or more indirect role in establishing the wages of the busdrivers and mechanics, it is directly involved in the payment of such wages." [SERB op., p. 4]

6. The City, not T.M.H., "is responsible for the payment of such wages." [SERB op., p. 5]

7. The City, not T.M.H., "is responsible for the payment of `operating expenses' for the transit system." This means the City is responsible for "all wages and compensation of all personnel (excluding the general manager who is paid by A.T.E.), all payroll, social security, property and all other taxes pertaining to the operation of the transit system." [SERB op., p. 4]

8. The agreement between the City and T.M.H. provides that all revenue received from the transit system "shall be and remain the absolute property of the City and the treatment of such revenue, including the banking thereof, and the accounting therefore, shall be as directed by the City." [SERB op., p. 4]

As a result of these facts, SERB concluded that

> it is unnecessary to look any further than the four corners of the contract to conclude that the City, and not T.M.H., is responsible for the payment of the employees' wages and that the functions provided by T.M.H.

in carrying out such are only ministerial in nature.

SERB op., p. 4.

In making its decision, SERB rejected T.M.H. and the City's arguments by noting that

> the conclusion that T.M.H. is the employer in this case because it does the paperwork for deducting taxes and issues paychecks from an account bearing its name (one established with City revenue) is in parity with an argument that because a secretary or payroll clerk performs these same tasks, that person is thereby the employer.

SERB op., p. 4.

REASONS FOR DENYING THE WRIT

A. THIS CASE INVOLVES AN ISSUE OF STATE STATUTORY INTERPRETATION. THESE EMPLOYEES ARE DEFINED UNDER STATE LAW, OHIO REVISED CODE §4117.01(c), AS PUBLIC EMPLOYEES. BECAUSE THESE ARE PUBLIC EMPLOYEES, FEDERAL LABOR LAW AND *GARNER* PREEMPTION DO NOT APPLY. 29 U.S.C. §152(2) EXEMPTS PUBLIC EMPLOYEES FROM THE PROVISIONS OF THE FEDERAL LABOR LAW.

This case solely involves an issue of state statutory interpretation. This case does not involve a federal issue.

This case involves the **state law definition** of "public employee" contained in Ohio Revised Code §4117.01(c). The Ohio Supreme Court found that these employees met the state definition of public employee. The Ohio Supreme Court found that these employees are employees of the City of Hamilton.

The City in its request for review by this Court is doing nothing more than attempting to have this Court reinterpret

the Ohio Supreme Court's interpretation of the Ohio legislature's statutory definition of public employee.

Because these employees are employees of the City of Hamilton, they are explicitly exempted from the provisions of federal labor law under 29 U.S.C. § 152(2). Therefore, no federal preemption issue exists.

Employees, such as those involved in the present case, of an Employer such as the City which "is not an employer under the [NLRA] . . . cannot qualify" as a labor organization under the terms of the NLRA. *Local Div. 589 v. Amalgamated Trans. U.* (USDC D. Mass. 1969), 295 F.Supp. 630, 632. Therefore, the NLRB would have no interest in this matter.

As a result of this, there could be no basis for finding preemption.

When a state characterizes the employment relationship as involving a public employer, "[b]ased upon that characterization . . . this Court must hold that the [entity involved] is a political subdivision of a State and is *not*, therefore, an `employer'" for purposes of federal labor law. *Division 1287, Amalgamated Trans. U. v. Kansas City Area Transp.*, 485 F.Supp. 856, 859 (W.D. Mo. 1980).

Similarly in the present case the Ohio Supreme Court has found under Ohio Revised Code §4117.01(c) that these Employees are employees of the City. As a result of this characterization under state law, it is clear that these employees are public employees and the City is not an employer under the provisions of 29 U.S.C. 152(2).

Neither *Garner v. Teamsters Local Union*, 346 U.S. 485 (1953), nor *San Diego Building Trades Council v. Garmon*, 359 U.S. 236 (1953), apply to the present case because *Garmon* pre-emption

> is designed to prevent conflict between, on the one hand, state and local regulation and, on the other, Congress' "integrated scheme of regulation," embodied in §§ 7 and 8 of the NLRA . . .
>
> *Building & Trades Council v. Assoc. Builders and Contractors of Mass./R.I.*, 113 S.Ct. 1190, 1195 (1993).

This case does not implicate the integrated scheme of regulation because these employees are employees of a political subdivision (*i.e.* the City), and therefore are exempt from the application of the NLRA by the terms of 29 U.S.C. 152(2).

There is no intrusion on federal labor law in this case because federal

labor law exempts the state and its political subdivisions.

Because, as the Ohio Supreme Court has held, these employees are public employees the NLRA (by definition) does not apply. Therefore, no federal preemption issue exists.

B. FEDERAL PREEMPTION DOES NOT APPLY BECAUSE THE CASE DOES NOT "ARGUABLY" COVER PROTECTED MATTERS. THE OHIO SUPREME COURT PROPERLY DETERMINED THAT THE CITY OF HAMILTON IS THE EMPLOYER AND THEREFORE THESE EMPLOYEES ARE PUBLIC EMPLOYEES.

As discussed above this matter is not one which involves a federal issue, because these employees are employees of the City which is exempt from the NLRA pursuant to 29 U.S.C. 152(2).

As discussed above, because this matter involves an employer and employees who are exempt from application of the NLRA, *Garmon* pre-emption does not apply.

However, there is another reason why *Garmon* pre-emption would not apply. *Garmon* pre-emption is inappropriate because this matter is not one which is "arguably" protected:

> The **precondition for pre-emption, that the conduct be "arguably" protected or prohibited,** is not without substance. It is not satisfied by a conclusory assertion of pre-emption . . . If the word "arguably" is to mean anything, it must mean that the party claiming pre-emption is required to demonstrate that his case is one that the Board could legally decide in his favor. That is, a party asserting pre-emption must advance an interpretation of the Act that is not plainly contrary to its language and that has not been "authoritatively rejected" by the courts or the Board.
>
> *Int'l Longshoremen's Assn. v. Davis*, 476 U.S. 380, 394-395 (1986).
>
> [Emphasis added.]

The Ohio Supreme Court correctly applied the "right of control" test to determine that the City, not T.M.H. was the employer. Therefore, this is not a

matter in which the NLRB could legally decide in the City's favor.

Under the right of control test, the question is:

> ...whether the employer has sufficient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.
>
> *National Transportation Service*, 240 NLRB (1979) at 565.

The facts amply demonstrate that the City of Hamilton, not T.M.H., has the control necessary for meaningful bargaining. The City funds the Transit System, pays the Transit employees, owns the Transit equipment, receives all fares and makes all the important decisions. All work performed by T.M.H. is done under the guidance of the City.

A.T.E./T.M.H. serves as an agent in carrying out the City policies and in

paying the Transit personnel with City funds.

The true employer of the employees in this case is the City, as found by the Ohio Supreme Court.

The NLRB's decision in *Res Care, Inc.*, 280 NLRB No. 78, demonstrates that this case is one where the true Employer is the City, not T.M.H., and therefore the NLRB would lack jurisdiction. In *Res Care*, the NLRB found the governmental entity was the true employer because:

> The DOL provisions under which Res-Care's wages and benefits are set establish to our satisfaction that DOL controls the primary economic terms and conditions of employment. ...In every sense, it is DOL, not Res Care, which retains ultimate discretion for setting wage and benefit levels on the job corps center, and thus effectively precludes Res-Care from engaging in meaningful collective bargaining.
>
> *Res Care* at 673

Here, the facts demonstrate that the City is like the governmental entity in *Res Care*, and no meaningful bargaining can be had between T.M.H. and the Union because of the City's control over "the primary terms and conditions of employment."

The Union cannot bargain meaningfully with T.M.H. because the City provides T.M.H.'s funds. T.M.H. cannot agree to any wage or benefit increases without the City's approval because the City provides **all** of T.M.H.'s funding. T.M.H. has no independent funding; it only has funds supplied by the City.

Because the funds are provided by the City, T.M.H.

> is performing a management service for an exempt government agency which exercises a substantial degree of

> control over the performance of its services which are intimately related to the city's municipal functions.
>
> *Mississippi City Lines, Division of American Transit Corp.*, 223 NLRB 11

In *Mississippi City Lines*, the NLRB held that the political subdivision exemption applied to a bus system where the management company was reimbursed for all costs which exceeded the revenues at the end of the month.

The present case is even more clearly one where this exception would apply than *Mississippi City Lines*, because the City of Hamilton receives all revenue, and pays all costs incurred by T.M.H.

For that reason, the City's argument on this issue is one which has been "authoritatively rejected" by the NLRB. Therefore this case is not one where the matter is "arguably protected" and *Garmon*

pre-emption does not apply. *Int'l Longshoremen* at 395.

C. THERE IS NO IMPLICATION ON FEDERAL LABOR LAW BY THE OHIO SUPREME COURT'S DECISION IN THE PRESENT CASE THAT THESE EMPLOYEES ARE PUBLIC EMPLOYEES.

As discussed above, the Ohio Supreme Court's determination in this case that these Employees were employees of the City was correct. Therefore, there would be no implication of federal law by application of the Ohio Statutory definition of "public employee."

This is demonstrated both by the facts and cases discussed above, as well as for the following reasons.

Because the City totally controls T.M.H.'s funding, T.M.H. lacks the discretion necessary for it to meaningfully bargain with the Union.

The NLRB has emphasized the importance of economic control in

determining the Employer. In *PHP Healthcare*, 285 NLRB No. 25, the non-governmental entity had "control over hiring, training, discipline, promotion standards, and grievances," but the NLRB held that the governmental entity was the true Employer because:

> **if an employer does not have the final say on the entire package of employee compensation**, i.e., wages and fringe benefits, **meaningful bargaining is not possible.**
>
> *PHP Healthcare* at 184.
>
> [Emphasis added].

In *Southwest Ambulance*, the NLRB found the government entity had the "right of control" even though the contracting agent "almost exclusively control[ed] its personnel policies and procedures." *Southwest Ambulance* 131 LRRM 1491, 1492.

The reason for this decision was "the

level of wages and benefits is set by the county in approving the budget on which the contract price is based." *Southwest Ambulance* 131 LRRM 1491, 1492.

The contractor in *Southwest Ambulance* had much more control over policies and procedures than T.M.H., yet the NLRB found that the governmental entity had the right of control because the contractor had

> **no demonstrated source of income other than the set-price contract with the county. Accordingly, it has no means of covering the cost of wages and benefits above the level set in its contract with the county.**
>
> *Southwest Ambulance* 131 LRRM 1491, 1492.
>
> (Emphasis added.)

Similarly, T.M.H. has no source of income other than that provided by the City. Because of this, T.M.H. lacks the ability to meaningfully bargain with the

Union. It cannot provide wages and benefits beyond what the City provides.

The NLRB noted in *Southwest Ambulance* that this lack of economic control **alone** was enough to establish that the true employer was the government entity. The board stated:

> Like the exempt entities in *PHP Healthcare* and in *Res-Care*, the county of San Diego effectively controls all of the economic terms and conditions of employment although the county exerts almost no control over the Employer's personnel policies and procedures. We find the *PHP Healthcare* controls the instant case.
>
> *Southwest Ambulance* 131 LRRM 1491, 1492

Because there would be no basis for finding anything other than that the City is the true employer under Federal labor law, there is no basis for *Garmon* pre-emption.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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